



POLICE DEPARTMENT

July 27, 2010

MEMORANDUM FOR: Police Commissioner

Re: Detective Mark Holder
Tax Registry No. 926964
Narcotics Borough Brooklyn South
Disciplinary Case No. 84356/08

The above-named member of the Department appeared before the Court on March 15, 2010, charged with the following:

1. Detective Mark Holder, while assigned to Brooklyn South Narcotics, while on-duty, on or about February 8, 2007, in the vicinity of 4th Avenue between 65th and 66th Streets, in Kings County, did abuse his authority as a member of the New York City Police Department in that said Detective wrongfully and without just cause did stop a vehicle occupied by individuals known to the Department, to wit: said Detective engaged said vehicle in a traffic stop without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 ABUSE OF AUTHORITY

2. Detective Mark Holder, while assigned to Brooklyn South Narcotics, while on-duty, on or about February 8, 2007, in the vicinity of 4th Avenue between 65th and 66th Streets, in Kings County, did fail to maintain his activity log in that after an encounter with an individual known to the Department, said Detective did not safeguard said activity log as provided for in Patrol Guide Section 212-08. (*As amended*)

P.G. 212-08, Page 1 ACTIVITY LOGS

The Department was represented by Adam Sheldon, Esq. and David Bernstein, Esq., Department Advocate's Office, and the Respondent was represented by James Moschella, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 1

and a plea of Guilty to Specification No. 2. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 1. The Respondent, having pleaded Guilty, is also found Guilty of Specification No. 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called John Jadallah and Vladimir Timko as witnesses.

John Jadallah

Jadallah had worked at his family's delicatessen for the last 15 years. He testified that on February 8, 2007, he intended to go to Little Italy in Manhattan to purchase a specific kind of coffee press as a gift for his mother-in-law. On the way he picked up Vladimir Timko at [REDACTED] in [REDACTED]. He and Timko used to be neighbors and had known each other for 12 or 13 years. While stopped at a red light at 67th Street and Fourth Avenue (Brooklyn), he was approached by two members of the service (subsequently identified as the Respondent and Sergeant Frankie Rivera, a lieutenant at the time of trial). According to Jadallah, he had not stopped anywhere between the time he picked up Timko and the time that the Respondent and Rivera approached the car.

Jadallah stated that as the members of the service approached, he was not moving around in the car or trying to conceal anything. It was dark outside, and Jadallah turned on the vehicle's

dome light and the lights underneath the console. He explained that he did this to make it easier for the officers, as he had nothing to hide from them. The Respondent came to the driver's side, and Rivera went to the passenger's side. The Respondent asked Jadallah if he had any "paraphernalia," and Jadallah replied negatively. At that point, the Respondent instructed him to turn off the car, place the keys on the dashboard, and step out of the vehicle. Jadallah complied with these instructions and walked to the rear of the car. Meanwhile, Rivera also brought Timko to the rear of the car.

Neither the Respondent nor Rivera went into the car at that point. According to Jadallah, the Respondent told him, "If I find any drugs on you or weapons, I'm going to arrest you, so just . . . tell me." Jadallah told the Respondent that he did not have anything illegal on him. Jadallah testified that the Respondent searched inside his jacket and pants pockets and had him raise his pant legs to the knees. Nothing illegal was discovered on his person. Jadallah could not clearly hear Rivera's questioning of Timko, but he did hear Rivera ask Timko why he was carrying pills. Jadallah did not recall Timko's response to that question. At one point, the Respondent walked over to Timko and started to question Timko himself. During this period, Jadallah could not see what Rivera was doing. After ten or 15 minutes, the officers informed Jadallah and Timko that they were free to leave. Jadallah shook both officers' hands.

Jadallah testified that when he went back inside the car he found "everything in shambles, paperwork out of the glove compartment . . . the baby car seats were out, stuff that was in the trunk was in the front, stuff that was in the glove compartment was all over, scattered all over the place." Furthermore, the car keys were missing. The Respondent and Rivera had not yet driven away, so Jadallah got out of the car and gestured to them that he was looking for his keys. The Respondent asked Jadallah where he put the keys, and Jadallah reminded him that he

had placed the keys on the dashboard. The Respondent and Rivera came back to Jadallah's car and looked for the keys. When Rivera found the keys, Jadallah thanked him. At that point, Rivera told him, "We were going to let you go, but now you're being arrested." Jadallah was placed in handcuffs.

Jadallah testified that at no point that evening prior to being arrested had he seen any pills or stopped his car to purchase drugs. At no point did Timko buy any drugs, nor did they stop the car to sell anything. When the police officers stopped him, there were no drugs inside the car. He did not see any pills inside the car prior to the stop. This was the first and only time that Jadallah had been arrested.¹

On cross-examination, Jadallah testified that when he picked up Timko, he waited in the car in front of the house. After Timko came outside and joined him in the car, they may have stopped at one or two traffic lights before being approached by the police. The Respondent and Rivera were in an unmarked vehicle, and Jadallah did not notice them until they got out of the car and were approaching. Jadallah knew that they were police officers, although he did not recall if their shields were displayed. According to Jadallah, he had done nothing that day to warrant the police pulling him over or searching his pockets. The Respondent asked Jadallah three times if he had any paraphernalia or weapons before the Respondent instructed him to get out of the car. While Jadallah was at the rear of the car, he was facing away from the car. He would have, therefore, been unable to see if somebody had gone inside the vehicle.

Jadallah testified that he learned only after the incident that Timko had a tin in his pocket with prescription medication in it. Jadallah knew that Timko had [REDACTED], but he had never

¹ The attorneys stated that Jadallah and Timko were arrested for Criminal Possession of a Controlled Substance in the Seventh Degree, but the District Attorney's Office declined to prosecute.

before seen him take out a tin or bottle of medicine. Jadallah heard Rivera question Timko about it. Jadallah had a lawsuit pending against the Respondent and Rivera.

On re-direct examination, Jadallah testified that it must have been Rivera who went inside the car because the Respondent was behind the car the entire time. At no point did Jadallah see the Respondent go inside the vehicle.

Vladimir Timko

Timko, a resident of [REDACTED], worked in the kitchen at [REDACTED] Hotel in Times Square. Because he had [REDACTED], he took three prescription medicines twice each day. These medications – [REDACTED] – did not affect his memory or ability to think.

On February 8, 2007, he carried five pills three [REDACTED] one [REDACTED] and one [REDACTED] with him in a small metal mints container inside his pocket. Department's Exhibit (DX) 1 was an exemplar of such a tin, measuring 2.25 inches by 1.5 inches. Inside the tin are three purple pills marked with a stylized [REDACTED],” followed by [REDACTED]”; one red pill marked [REDACTED]” on one side and [REDACTED]” on the other; and one white pill (the pills have decayed due to moisture). Timko identified these pills as the same kind he was carrying at the time of the incident.

Timko testified that at approximately 6:30 p.m. that day, his longtime friend Jadallah picked him up at home. They were going to go into Manhattan to shop for a gift for Jadallah's mother-in-law. Nobody else was in the vicinity as Timko walked from his house to Jadallah's car. While driving, they did not make any stops other than at traffic lights. While at a light, the police approached. As they were approaching, neither Timko nor Jadallah moved around the car or tried to hide anything.

The Respondent approached Jadallah's side of the vehicle and asked multiple times if there was anything inside the car of which the police should be aware. Jadallah and Timko replied that they did not have anything, and the police instructed them to exit the car. Once outside the car, Rivera told Timko to turn around. Rivera proceeded to reach his hand into Timko's pocket. At that point, Timko informed Rivera that he had medicine in his pocket because he is [REDACTED]. Rivera asked Timko why he did not carry the medicine inside prescription bottles. Rivera took possession of the pills, and Timko did not recall ever getting them back.

Rivera told Timko to join Jadallah at the rear of the car. While the Respondent asked Timko questions at the rear of the car, Rivera searched the inside of the car. Timko could not recall if the Respondent asked him any questions about the medications. At one point, the police told Jadallah and Timko that they were free to leave. Timko described the inside of the car as "a total mess." Because Jadallah could not find the car keys, he asked the police officers about it. At that point, Rivera told Jadallah and Timko, "We were going to let you go, now you're under arrest."

Timko testified that at no point that evening prior to being arrested had Jadallah stopped his car to purchase drugs. At no point did Timko buy any drugs, nor did they stop the car to sell anything. At no point while inside the car did Timko take his pills out of his pocket. There were no pills loose inside the car. This was the first and only time that Timko had been arrested.

On cross-examination, Timko testified that there could have been somebody walking by on the street as he walked from his house to Jadallah's car. He did not have anything to indicate that the pills on his person were legally prescribed. According to Timko, the reason he told Rivera about his [REDACTED] was not because he was concerned that the pills would be mistaken for

something illegal, but because he “was brought up to trust the police officers. . . . Be upfront and be honest with them. Let them know.” At no point did Timko observe the Respondent go inside the car and search it.

A few weeks after the arrest, a lawyer filed a complaint on behalf of Timko and Jadallah with the Civilian Complaint Review Board (CCRB). Timko currently has a lawsuit pending against the Respondent and Rivera.

The Respondent’s Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, a ten-year member of the Department, had been assigned to Narcotics Borough Brooklyn South for approximately four years. During the course of his career, he had participated in 1,500 or 2,000 arrests. He had personally effected approximately 500.

The Respondent testified that on February 8, 2007, he was working with Rivera, “checking out spots that [they] knew were high in narcotics activities.” [REDACTED] was one of these locations. According to the Respondent, it was an area known for marijuana, crack, and pills. He and his colleagues had made drug-related arrests on that street in the past. The Respondent explained that drug transactions in that area are done by car with “either people sit[ting] in the car and someone may walk up, or a car may pull behind them.”

On the day of the incident, the Respondent and Rivera were driving westbound on [REDACTED] Avenue when they observed Jadallah’s vehicle running with Jadallah and Timko sitting inside. The car’s lights were on. According to the Respondent, this was consistent with drug

transactions he had seen in the past. The Respondent and Rivera parked a couple of car lengths behind Jadallah's vehicle and continued to watch. The Respondent testified that he saw a white male come out of a building and approach the car. This male had a brief conversation with Timko, touched hands with him as if shaking hands, and then returned into the building. Although the Respondent did not specifically observe an object or money pass between the two men, "based on [his] knowledge and [his] experience, [he was] thinking it's obviously a drug transaction that just transpired." This was his "assumption."

When Jadallah drove away, the Respondent followed to conduct further investigation. While Jadallah's vehicle was stopped at a red light on Fourth Avenue, the Respondent and Rivera approached. The Respondent stated that Jadallah may have stopped at other red lights before he reached Fourth Avenue.

The Respondent testified that as he approached the car, he saw two loose pills in the center console. He did not know if the pills were legal, and he asked Jadallah, "Is there anything in the car that I need to know of?" He also instructed Jadallah to get out and go to the rear of the vehicle. Meanwhile, Rivera was on the passenger's side of the car with Timko. The Respondent could not hear what Rivera and Timko were talking about. At one point, Rivera brought Timko back to where the Respondent and Jadallah were standing. Rivera, who had taken a mints tin with pills off of Timko's person, ultimately decided that Jadallah and Timko should be arrested. To the Respondent's recollection, at no point were Jadallah and Timko told that they were free to leave. The Respondent later learned that the District Attorney's Office was going to decline prosecution in this case.

At some point after the arrest, the Respondent lost his Activity Log. He informed a supervisor and was issued a new Activity Log. When he was initially called in to CCRB for the

investigation into Jadallah and Timko's complaint, however, he could not recall the incident because he had no paperwork to refresh his memory. He later recalled the specifics of the encounter.

On cross-examination, the Respondent testified that the stop was based solely on the handshake that the Respondent observed. The handshake was documented in his lost Activity Log, but it was not documented on any other Department paperwork. He explained that someone else would have prepared the arrest paperwork for Jadallah and Timko, and he could not recall whether or not he ever reviewed it. While Jadallah and Timko were the only arrests that the Respondent personally effected during that tour, he was the assigned arresting officer for other arrests that his narcotics team made.

The Respondent could not recall the Bay Ridge Avenue address from which he observed an unidentified male exit and approach Jadallah's car. He did not document the address anywhere. The Respondent did not have any prior dealings with that particular building, and he did not know it to be a drug-prone location. Based on his training and experience, the Respondent believed that the occupants of the vehicle were buying drugs from the man. The Respondent did not recognize the man. The exchange between Timko and the man was "really, really quick," approximately two minutes. Other than this quick conversation and the touching of hands, the Respondent did not observe anything else indicative of any type of criminality. The touching of the hands occurred outside of the car window and was visible to the public.

The Respondent could not recall the exact distance between his car and Jadallah's car at the time. Although the Respondent was sitting in the driver's seat of his car and the hand contact occurred on the passenger's side of Jadallah's car, the Respondent had a clear and unobstructed

view of the contact. At the time, it was dark outside. The Respondent could not recall if his headlights were on.

After seeing what he believed to be a drug transaction, the Respondent admitted that he did not make any radio transmissions to his team members in other vehicles about observing the transaction, a description of the seller, or the fact that he and Rivera were following the Jadallah-Timko car.

As the Respondent approached Jadallah's vehicle, he observed Jadallah and Timko moving. This raised his suspicion that something illegal might be going on inside the car. The Respondent could not recall if he used a flashlight or if the car's interior lights were on.

The Respondent could not recall what the loose pills in the center console looked like, and he did not know what kind of pills they were. The Respondent did not observe Jadallah or Timko attempt to hide the pills, and he did not remove the pills from the car.

The Respondent testified that he did not prepare the Property Clerk's Invoice for the arrest evidence. DX 2 was a Property Clerk's Invoice, which the parties stipulated was the only arrest evidence voucher pertaining to the arrests of Jadallah and Timko. The voucher listed the following: two blue pills marked "[REDACTED]" one white pill marked "[REDACTED]" one orange pill marked "[REDACTED]"; and one metal box.

When asked on re-direct examination why he did not pursue the man he believed was the seller in the drug transaction, the Respondent replied, "Both myself and the Sergeant decided to pursue the vehicle and seeing the guy went back into the building, we decided that we would just pursue the vehicle." The Respondent stated that someone else on his field team prepared the arrest paperwork. The Respondent never discussed the arrest with that team member. Before reporting for his CCRB interview, the Respondent did not know what he was going to be asked.

The Respondent did not have a specific recollection of Jadallah turning on the interior lights of the car.

FINDINGS AND ANALYSIS

Specification No. 1

In the first specification, the Respondent is charged with making an improper car stop. The complainants, John Jadallah and Vladimir Timko, alleged that they were pulled over in the vicinity of Fourth and Bay Ridge Avenues in Brooklyn and searched for no reason. The Respondent testified that he observed a hand-to-hand transaction and pulled over their vehicle. The complainants denied doing anything that could have appeared to be such a transaction. Two pills were allegedly found in the center console and the complainants were arrested for criminal possession of a controlled substance. The District Attorney's office declined to prosecute; there was evidence that Timko took medication for [REDACTED].

Both parties portrayed this case as one where the Court had to determine who was more credible, the complainants or the Respondent. Several factors of the case are important to the credibility determination. The Respondent was assigned as part of a SNEU team. He was the operator of his vehicle. From several car lengths behind, he observed an individual exit an unknown building and give a handshake or "hand touch" to the passenger of a vehicle. The Respondent testified that he thought "it's obviously a drug transaction that just transpired." The Respondent made no documentation concerning where this putative transaction had occurred. The other individual in the transaction was not apprehended; the Respondent testified that the individual re-entered a residential building and there was no legal cause to pursue him. The Respondent could not give a description of the unapprehended individual beyond that he was a

male white. The Respondent did not transmit a description of the individual to any other members of his team.

Nor could the Respondent state what was involved in the transaction. He could not state, for example, whether the complainants appeared to hand over United States currency, or whether the putative seller appeared to hand over a baggie, a vial, or the like. He could only state that the individuals' hands touched or "locked."

The complainants testified that they were on their way to Little Italy in Manhattan to pick up a gift. They said that they did not stop to speak to anyone on the side of the road. The only narcotics allegedly found in the vehicle were two loose pills. The Respondent stated that he observed two pills in the center console of the complainants' vehicle, in the open and not in any container. Sergeant Rivera, the Respondents' supervisor, made the decision to arrest both occupants. He did not testify.

The passenger in the vehicle, Timko, testified that he suffered from [REDACTED] and carried his day's medication in a Starbucks mints tin. Each day, he took [REDACTED] and [REDACTED] in varying amounts. The driver, Jadallah, denied that there were any loose pills in the center console. The only vouchered evidence consisted of the pills recovered from Timko. The pills listed on the voucher corroborated the pills Timko stated he had for his [REDACTED]

Timko was exceedingly nervous during his testimony, to the point of refusing to answer certain questions without the presence of counsel. As the Advocate pointed out, however, Timko simply may have been scared about making an erroneous statement, especially in view of his upcoming lawsuit against the city, as opposed to concocting a story.

Although counsel for the Respondent contended that the complainants were doing "something" awry on the night in question, thus justifying the stop, the evidence does not

support that assertion. The Respondent alleged that pills were found in the center console. Yet these drugs were never vouchered. The only drugs vouchered were those in Timko's tin. The fact that the narcotics allegedly seen loose in the console were not recovered is highly detrimental to the Respondent's credibility. His credibility was also damaged by his cavalier assertion that upon seeing a hand touch or handshake between a pedestrian and a vehicle passenger, "obviously" a drug transaction had occurred.

In contrast, the Court viewed the complainants as credibly testifying that they never stopped their vehicle to speak to anyone, or did anything that could have appeared that way. The fact that no contraband was found in their vehicle or their person supports their claim that not only did they not stop to buy or sell drugs, but that they had no reason to stop whatsoever.

The Court concludes that the Department proved, by a preponderance of the evidence, that the car stop was unauthorized.

Specification No. 2

The Respondent, having pleaded Guilty to the second specification (losing his Activity Log), is found Guilty.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Department on September 29, 2000. Information from his personnel file that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty of conducting a car stop without authorization. He has also been found Guilty of losing the Activity Log from the day of the stop. Nevertheless, there is no evidence that the Respondent's goal in stopping the vehicle was anything other than to interdict narcotics activity. Accordingly, the Court recommends that the Respondent be penalized with the forfeiture of 5 vacation days. See generally *Case No. 78516/03*, signed Aug. 10, 2004 (fifteen-year lieutenant forfeited 5 vacation days for unlawfully frisking and threatening to arrest an individual; there was sufficient cause to stop and question complainant, but no reasonable suspicion that he possessed a weapon; further, as complainant walked away from site of frisk, he shouted comments at the lieutenant, who threatened arrest for disorderly conduct though there was no probable cause).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
DEC 14 2010

RAYMOND W. KELLY
POLICE COMMISSIONER

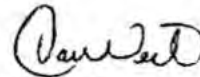
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE MARK HOLDER
TAX REGISTRY NO. 926964
DISCIPLINARY CASE NO. 84356/08

The Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his most recent annual performance evaluation. He was also rated 3.5 in 2004, and in 2006 was rated 4.0 "Highly Competent." He has been awarded one medal for Excellent Police Duty and one medal for Meritorious Police Duty. [REDACTED]

[REDACTED] He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials